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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 213

HELMUT LEGERLOTZ,
Petitioner

v.

WILLIAM P. ROGERS, Attorney General of the United States,
Respondent

PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1959.

No. .....

Helmut Legerlotz,

Petitioner

v.

William P. Rogers, Attorney General of the United States,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Helmut Legerlotz, petitioner herein, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on April 16, 1959 affirming the order of the United States District Court for the District of Columbia granting respondent's motion for summary judgment and dismissing petitioner's complaint.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, copy of which is appended hereto, is reported at 266 F. 2d 457.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254.

QUESTIONS PRESENTED

1. Is Section 12 of the Administrative Procedure Act relating to judicial review of agency action applicable to seizures and returns of property under the Trading with the Enemy Act?

2. Is the taking in 1955 by the Attorney General of property of a non-enemy whose property was ordered returned in 1949 judicially reviewable under the Trading with the Enemy Act?

3. If the seizure is not subject to judicial review, is such taking violative of the just compensation and due process requirements of the Fifth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment Number Five to the Constitution of the United States.

2. Sections 7 and 9(a) of the Trading with the Enemy Act, enacted October 6, 1917 (Public Law 91; 65th Congress, 40 Stat. 411).

3. Sections 32(a)(2)(C) and 33 of the Trading with the Enemy Act as amended, enacted August 8, 1946 (Public Law 671, 79th Congress, 60 Stat. 925).

4. Sections 10(a) and (e) and 12 of the Administrative Procedure Act, enacted June 11, 1946 (Public Law 404, 79th Congress, 60 Stat. 243).

STATEMENT OF THE CASE

On September 29, 1943 the Alien Property Custodian, acting under the Trading with the Enemy Act, summarily

seized property owned by the petitioner. Petitioner had been arrested in Paris in October 1941 by the Germans and imprisoned by them during the war for aiding the Allied war effort. After hostilities ended he filed formal claim for the return of his property, and in June 1947 entered the United States as a permanent resident.

On December 22, 1948, respondent published a notice of intention to return petitioner's property to him based on the allowance of petitioner's claim under Section 32 (a)(2)(C) of the Trading with the Enemy Act, providing for return to persons considered non-enemies and persecuted during the war, and on March 3, 1949 respondent published an order returning petitioner's property to him. Of this property the sum of $78,930.45 was not delivered to petitioner, and almost seven years later, on December 22, 1955, respondent published what purported to be an amended return order retaining the sum of $48,317.94 "in the interest of the United States" and reserved an additional sum of $30,612.51 for possible federal income tax liability on the $48,317.94 never received by petitioner.

Petitioner filed action in the United States District Court for the District of Columbia to require payment to him of the property ordered returned but not delivered to him. Respondent filed a motion for dismissal or summary judgment, which the court granted on the ground of lack of jurisdiction. Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit, which court affirmed the judgment of the lower court.

REASONS FOR GRANTING THE WRIT

The issues presented by this case raise fundamental questions as to the reviewability of federal agency action, the extent of the federal power of summary seizure of non-enemy property without compensation during peacetime under the war power, the right of a non-enemy

whose property is so seized to obtain judicial review of such action, and the constitutionality of such seizure in the absence of judicial review, under the Fifth Amendment.

The court below failed to consider these issues, although they were properly raised, and its judgment would sanction such seizure power, free from any judicial review, and establish a dangerous precedent in the administration of such power in the future, contrary to the firm position taken by this Court in circumscribing the permissible area of summary seizure without compensation, and attaching thereto as a constitutional requirement the right of judicial review.

I. Are Summary Seizures of Property and Returns under the Trading with the Enemy Act Exempted from Judicial Review under the Administrative Procedure Act?

This Court has in the past held that the judicial review provisions of Section 12 of the Administrative Procedure Act should be given a broad interpretation. In the case of *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, it was held that agency actions under an immigration statute enacted after the Administrative Procedure Act, and including a finality provision, are reviewable. The Court said of Sections 10 and 12 of the Administrative Procedure Act:

> "Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act. And as the Court said in the *Heikkila* case, the Procedure Act is to be given a 'hospitable' interpretation."

The Administrative Procedure Act was enacted on June 11, 1946. Section 12 of that Act provides that:

> ". . . no subsequent legislation shall be held to supersede or modify the provisions of this Act, except to the extent that such legislation shall do so expressly."

Public Law 671 of the 79th Congress, under which petitioner was found eligible to have his property returned, was enacted on August 8, 1946, and contained no language excepting agency action thereunder from the review provisions of the Administrative Procedure Act, or incorporating by reference any previous legislation providing such exception. Accordingly Public Law 671 is subsequent legislation, and agency actions thereunder are subject to judicial review under Section 12 of the Administrative Procedure Act.

II. Does a Person Whose Property Is Taken under the War Power Have the Right to Judicial Review of the Legality of the Taking?

In addition to the relief provisions under which petitioner's property was ordered returned, another provision is contained, in a separate section of the Trading with the Enemy Act (Section 9), for the filing of suits by persons who were not residents of enemy territory during a war period, provided suit is filed within two years. Petitioner was in a German concentration camp during much of the period, and after his release and immigration into this country, an order declaring him eligible for the return of his property, and ordering the full return of such property, was signed and published by the respondent under Public Law 671, prior to the expiration of the two year period. It was approximately seven years later, long after the period for filing suit under Section 9 had expired, that respondent issued a new order retaining the property. The effect of the decision of the court below was to deprive petitioner of any judicial review whatever under either statutory provision.

The seriousness of the denial of right of judicial review of summary seizure under the war power, under the federal Constitution, was expressed in the recent decision of this Court in *Societe Internationale* v. *Rogers*, 357 U.S. 197, as follows:

> "Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure."

There was no statutory provision authorizing the taking in 1955, but if Section 9 of the Trading with the Enemy Act is applicable, the two year period for filing suit thereunder must be construed to give petitioner the opportunity to challenge the taking, which is certainly not the case if the period is held to expire before the taking occurred. The necessity of such a construction, if the taking is to be found constitutional, was discussed by this Court in *Becker Steel Company* v. *Cummings*, 296 U.S. 74, in the following terms:

> "The seizure and detention which the statute commands and the denial of any remedy except that afforded by § 9(a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the non-enemy owner either the return of his property or compensation for it . . . In determining whether the remedy given is thus restricted it must be presumed that Congress intended that it should be constitutionally sufficient. The implication that by the appropriation of private property to public use the United States undertakes to make just compensation for it . . . must likewise enter into the construction of a statute giving to a non-enemy a remedy for the seizure of his property as a war measure. Only compelling language in the congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the government granted in recognition of an obligation imposed by the Constitution . . . Hence § 9(a) must be broadly construed to give effect to its remedial purpose."

The importance of providing such a remedy was pointed out in *Brinkerhoff-Faris' Company* v. *Hill*, 281 U.S. 673, 682, where the Court held:

> "Whether acting through its judiciary or through its legislature a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

This Court had recent occasion to say, in *Greene* v. *McElroy*, decided June 29, 1959:

> "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process."

Due process is not satisfied by mere formal procedural correctness. *Foster* v. *Illinois*, 332 U.S. 134, 136. Providing a statutory remedy which is, in fact, ineffective, does not fulfill the requirement. *Long Island Water Supply Company* v. *Brooklyn*, 166 U.S. 685, 695, *Leigh* v. *Green*, 193 U.S. 79, 90. The test is whether the practical effect is still the deprivation of property without due process or compensation. *Chicago, Burlington and Quincy Railroad Company* v. *Chicago*, 166 U.S. 226, 241. A person whose property is taken by administrative action has a right to challenge the validity of the taking.

As this Court said in *State of Washington ex rel Oregon Railroad and Navigation Company* v. *Fairchild*, 224 U.S. 510, 524:

> "So that when the taking is under an administrative regulation the defendant must not be denied the right to show that as a matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment."

If the taking in 1955 is to be rescued from unconstitutionality by the provision for judicial review under Section 9, that remedy must be shown to be an effective one. Here it was completely unavailing, since the time for

filing suit expired prior to the taking, unless the statutory period for filing suit can be construed as beginning to run in 1955, when the actual taking occurred through the purported amendment of the return order, resulting in the retention of petitioner's property.

III. If Respondent's Action in 1955 Is Not Reviewable under the Trading with the Enemy Act or the Administrative Procedure Act, Such Action Was Invalid as a Taking of Property without Just Compensation and without Due Process of Law.

This Court has in the past struck down confiscatory actions taken under the guise of governmental power. The form of taking is not decisive, since the duty to compensate rests on the Constitution itself, and not statute. *Jacobs* v. *United States*, 290 U.S. 13. This applies to the exercise of the war power. *Mitchell* v. *Harmony*, 13 How. 134, *United States* v. *Russell*, 13 Wall. 629. The right to compensation for the taking of non-enemy property is based on the Constitution, and in the words of Chief Justice Marshall, writing in *United States* v. *Percheron*, 7 Pet. 51, even in the case of conquest "the modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged an felt by the whole civilized world would be outraged, if private property should be generally confiscated".

Protection of private non-enemy property from governmental seizure except where required in the public interest, and then only under such conditions as to guarantee just compensation and judicial review as to the legality of such seizure, is one of the foundations of our constitutional system, and to permit an administrative taking under conditions which do not satisfy those requirements strikes at the heart of that system.

CONCLUSION

This case presents issues involving the basic right of persons whose property is taken by governmental action without providing compensation to seek judicial review to test the legality and constitutionality of such taking. The judgment of the court below, denying such right, is contrary to the decisions of this Court, and it is submitted that the effect of the precedent established by that judgment is of such far-reaching consequences as to call for consideration by this Court.

Respectfully submitted,

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United States Court of Appeals for the District of Columbia Circuit. Filed Apr. 16, 1959, Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1959

No. 14,587

C.A. 5477-55

HELMUT LEGERLOTZ, APPELLANT,

v.

WILLIAM P. ROGERS, Attorney General of the United States, APPELLEE.

Appeal from the United States District Court for the District of Columbia

---

Before PRETTYMAN, Chief Judge, and WILBUR K. MILLER and WASHINGTON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment . . . of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge WASHINGTON.

Dated: Apr. 16, 1959.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,587

HELMUT LEGERLOTZ, APPELLANT,

v.

WILLIAM P. ROGERS, Attorney General of the United States, APPELLEE.

Appeal from the United States District Court for the District of Columbia

---

Decided April 16, 1959

Mr. Robert H. Reiter for appellant.

Mr. George B. Searls, Attorney, Department of Justice, with whom *Mr. Irwin A. Seibel*, and *Miss Sharon E. King*, Attorneys, Department of Justice, were on the brief, for appellee. *Miss Marbeth A. Miller*, Attorney, Department of Justice, also entered an appearance for appellee.

Before PRETTYMAN, Chief Judge, and WILBUR K. MILLER and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge:* This is an alien property case, in which the central issue is whether plaintiff-appellant is barred by the statute of limitations.

On September 29, 1943, the Alien Property Custodian seized property belonging to the appellant. 8 FED.REG. 13271. Formal claim for the return of the property, satisfying the requirements of both Sections 9(a) and

32 of the Trading with the Enemy Act,[1] was filed on December 16, 1946.[2] On December 22, 1948, the Attorney General published a notice of intention to return appellant's property, pursuant to Section 32(f) and the appropriate regulations. 13 FED.REG. 8236. On March 3, 1949, the Attorney General published an order providing for the return of appellant's property, amounting to approximately $733,000. 14 FED.REG. 973. Substantial payments to plaintiff-appellant were made under the order of return. The sum of $30,612.51 was retained to cover tax liabilities. Some six and a half years later, on December 22, 1955, the Attorney General published an amended order of return, retaining the further sum of $48,317.94. 20 FED.REG. 9871. The Government says it retained this amount pursuant to the Blum-Byrnes Agreement between the United States and France.[3] Payment was made to appellant of the net amount remaining. Subsequently, the appellant filed suit in the District Court to require payment of the total retained amount of $78,930.45. Summary judgment for the appellee was granted on the ground that the statute of limitations had run on a suit under Section 9(a) of the Trading With the Enemy Act. The District Court also observed that there could be no judicial review of the Attorney General's actions under Section 32 of the Act. This appeal followed.

The main issue in the case is whether the plaintiff's suit under Section 9(a) was timely brought. Section 33 of the Act provides that "No suit pursuant to section 9 . . . may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure . . . or vesting . . . , but in computing such two years

[1] 40 Stat. 411 (1917), as amended, 50 U.S.C.App. §§ 1-40 (1952), as amended, 50 U.S.C.App. §§ 6b, 9, 20, 32, 33, 39 (Supp. V, 1958).

[2] According to the appellant, informal notice of claim had been filed in or around August of 1945. This will be discussed later in this opinion.

[3] 63 Stat. 2507 (1949).

there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) . . . ." The plaintiff argues that he had given an informal notice of claim prior to the two-year period and therefore the statute of limitations was tolled, or at least that there was a question of fact whether he did give such informal notice and therefore summary judgment should not have been granted. An inspection of the documents which he presented to the District Court, however, shows that his claim of having given informal notice in or around August of 1945 is essentially frivolous and not worthy of serious consideration. The court had the power to determine whether any "genuine issue of material fact" existed. FED.R.CIV.P. 56. It seems plain that there was no genuine issue.

Appellant further argues that the statute of limitations should not apply to him, under the circumstances here presented, quite apart from the contention as to informal notice. But the wording of Section 33 of the Act is very clear. If more than two years have elapsed since seizure and no tolling has occurred, no suit pursuant to Section 9(a). "may be instituted after April 30, 1949." *See Brownell* v. *Moriza Nakashima*, 243 F.2d 787 (9th Cir.), cert. denied, 355 U.S. 872 (1957); *Grabbe* v. *Brownell*, 247 F.2d 402 (2d Cir. 1957); *Pass* v. *McGrath*, 89 U.S.App.D.C. 371, 192 F.2d 415 (1951), cert. denied, 342 U.S. 910 (1952); *Pederson* v. *Brownell*, 129 F.Supp. 952 (D.Ore. 1955).

Section 33 is a harsh statute. But it must be pointed out that the plaintiff here had until April 1949 to bring suit under Section 9(a). It is true that he filed a formal claim in 1946 which was presumably valid under either Section 9(a) or 32(a), but proceedings under "sections 9(a) and 32(a) are independent and exclusive of each other." *McGrath* v. *Zander*, 85 U.S.App.D.C. 334, 337, 177 F.2d 649, 652 (1949).[4] Proceedings under Section

[4] For a detailed analysis of the differences between Section 9(a) and Section 32(a) proceedings see Comment, 62 YALE L.J. 1210, 1214-25 (1953).

9(a) are for the return of property to non-enemy aliens, and under Section 32(a), for the return of property to certain "technical enemies" and others deemed worthy of obtaining return. Furthermore, the very nature of a Section 32 proceeding could well have led the plaintiff to bring suit under Section 9(a) prior to April 30, 1949, even though the Government had indicated its intention to return the property, for it would seem that prior to return the property still remains vested in the Alien Property Custodian (or the Attorney General as his successor), and not in the claimant. According to Section 32(f) and Regulation § 502.107, 20 FED.REG. 7534, the notice of intention to return may be revoked at any time prior to return. Should the Attorney General revoke his intention to return on the basis of national interest, the claimant has no additional basis for suit, for Section 32(f) specifically states that "Publication of a notice of intention to return shall confer no right of action upon any person to compel the return of any such property . . . ."[5]

Nor does this court have jurisdiction under Section 32(a) to grant relief, either in a suit in equity or by judicial review of the Section 32 administrative proceedings, because by virtue of Section 7(c) the exclusive judicial remedy under the Act is to be sought under Section 9(a).[6] See *Tiedemann v. Brownell*, 96 U.S.App.

[5] Even if it were to be considered reasonable for the appellant to have relied on the acts of the Custodian in refraining from bringing suit under Section 9(a), the fact remains that estoppel cannot be used against the Federal Government. See Anderegg v. United States, 171 F.2d 127, 128 (4th Cir. 1948); *cert. denied*, 336 U.S. 967 (1949); *cf.* Wallace v. United States, 142 F.2d 240, 242 (2d Cir.), *cert. denied*, 323 U.S. 712 (1944). See also Andreae v. Redfield, 98 U.S. 225 (1878).

[6] Section 7(c) specifically states that "the sole relief and remedy of any person having any claim . . . shall be that provided by the terms of this Act . . . ." Section 9(f) specifies that except as provided in Section 9, property which is or has been vested in the Custodian "shall not be . . . subject to any order or decree of any court."

D.C. 9, 222 F.2d 802 (1955); *Hawley* v. *Brownell*, 94 U.S. App.D.C. 104, 215 F.2d 36 (1954); *McGrath* v. *Zander*, *supra*. By parity of reasoning, there can be no judicial review under Section 10 of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1952). *McGrath* v. *Zander*, *supra* at 336, 177 F.2d at 651.

For these reasons we conclude that the judgment of the District Court must be

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

HELMUT LEGENLOVE, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 213

HELMUT LEGERLOTZ, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the district court dismissing the complaint (J.A. 55)[1] is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. 11–15) is reported at 266 F. 2d 457.

JURISDICTION

The judgment of the court of appeals was entered April 16, 1959 (Pet. 10). The petition for a writ of certiorari was filed on July 15, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The Joint Appendix in the court of appeals is designated herein as "J.A."

QUESTION PRESENTED

Petitioner failed to bring suit under Section 9(a) of the Trading with the Enemy Act by April 30, 1949, as required by Section 33 of that Act, to recover property seized by the Government. The question here is whether he may thereafter obtain judicial review of administrative action taken under Section 32 of the Act, which provides for discretionary administrative returns of vested property.

STATUTES INVOLVED

The pertinent portions of Sections 7(c), 9(a), 9(f), 32, and 33 of the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. § 1, *et seq.*, are set forth in the Appendix, *infra*, pp. 11–14.

STATEMENT

In 1943, while the petitioner was in German-occupied territory (J.A. 9–10), the Alien Property Custodian, pursuant to the Trading with the Enemy Act, seized his rights as licensor under a patent-license contract with Syngala G.m.b.H. and others (J.A. 1–2). The petitioner's rights "vested in" the Custodian on September 27, 1943.[2] Subsequently, the licensee made payments to the Custodian, and to the Attorney General as his successor

[2] This was the date that the vesting order (No. 2044) was filed with the Federal Register (8 F.R. 13271). By Section 5(b) of the Trading with the Enemy Act, as amended December 18, 1941, the President was authorized to direct "when" property should vest. This authority was delegated to the Alien Property Custodian and, by regulation, the Custodian ordered that property should be "deemed to have vested" as of the date the order was filed with the Federal Register. See 8 C.F.R. (1958 Rev.) § 504.1 (17 F.R. 1982).

After the termination of hostilities, the petitioner filed a Notice of Claim[3] with the Office of Alien Property on December 16, 1946, for the return of the property (J.A. 7–11) and asked that the claim be considered under Section 32 of the Trading with the Enemy Act, (*infra*, pp. 13–14), which had been added to the Act in 1946. 60 Stat. 50.

The Director of the Office of Alien Property determined that the petitioner was eligible for allowance of his claim under Section 32 as a "persecutee" (J.A. 13), and published in the Federal Register on December 22, 1948, a "Notice of Intention to Return" (J.A. 2–3). On February 28, 1949, he published in the Federal Register a "Return Order."[4] The order directed the return of the amounts collected under the license (totalling $733,293.87) plus "interests and rights," but "subject to any increase or decrease resulting from the administration thereof prior to return, and after adequate provisions for taxes and conservatory expenses" (J.A. 53). Up to and including March 21, 1954, the Office of Alien Property returned to the petitioner a total of $461,762.68 and paid the Director of Internal Revenue $190,674.59 for income

[3] In the Notice of Claim, petitioner stated his address as Vichy, France. He came to the United States in 1947.

[4] The "Return Order" is the order by the Director authorizing and directing the final audit and the preparation of the necessary papers. Regulations of the Office of Alien Property, §§ 502.108–502.110. (Reference is to the 1955 edition of the Regulations, which appear in the Joint Appendix following page 45. There has been no significant change in the regulations since 1955.)

taxes.[5] The Office of Alien Property retained the sum of $30,612.51 for additional taxes (J.A. 44) and on December 15, 1955, the Director amended the Return Order to direct the retention of an additional $48,317.94, on the ground that that amount arose out of war production prior to September 2, 1945, and came within the terms of the Memorandum of Understanding between the United States and France for "return lend-lease" (20 F.R. 9871; J.A. 13, 14).[6]

On the same day, December 15, 1955, the petitioner sued in the District Court for the District of Columbia under Section 9(a) of the Trading with the Enemy Act (*infra*, pp. 11–13) for the recovery of the retained $48,317.94 (J.A. 1–3). He later attempted to amend the complaint also to include the $30,617.51 retained for taxes.[7] The Attorney General moved to dismiss the complaint or for summary judgment on the ground that suit was not brought within the period of time allowed by Section 33 of the Act (*infra*, p. 14) (J.A. 5, 6), and the district court granted the motion on the ground of lack of jurisdiction (J.A. 55). The court of appeals affirmed (Pet. 10, 11–15).

ARGUMENT

Petitioner claims a "taking" of his property occurred on December 15, 1955, when the Attorney Gen-

[5] These figures are from the records of the Office of Alien Property. They were given to the court of appeals and petitioner has not challenged them.

[6] This was the "Blum-Byrnes Agreement" which became effective on May 28, 1946. See 61 Stat. 4175, T.I.A.S. 1928; 63 Stat. 2507, T.I.A.S. 1936.

[7] The court of appeals treated the complaint as so amended (Pet. 12).

eral amended the Return Order to retain the additional sum of $48,317.94 (Pet. 2, 6–8). On the basis of this assumption, he argues that he was entitled to review of the administrative action, either under Section 12 of the Administrative Procedure Act or under Section 9 of the Trading with the Enemy Act (*infra*, pp. 11–13). In fact, however, petitioner's only judicial remedy for the seizure of property by the Alien Property Custodian is under Section 9(a) of the Act. Under Section 33 (*infra*, p. 14), however, actions under Section 9(a) cannot be maintained after April 30, 1949, or more than two years after the property vested in Custodian, whichever is later. Since petitioner's property was vested in September 1943 and this suit was not brought until 1955, he is not entitled to judicial review of the administrative action.

1. *Petitioner's property was not taken when the Return Order was amended.* Petitioner's property clearly vested in the Alien Property Custodian in September 1943 (*supra*, p. 2). Therefore, petitioner's contention that the amendment of the Return Order in December 1955 was a new taking assumes that the Return Order was a binding commitment on the Attorney General to return the property. Only under such an assumption can the amendment of the Return Order, applying to property already vested in the Attorney General, be a "taking."

Section 32 of the Act (*infra*, pp. 13–14), however, under which petitioner claims the right to the return of his property, gives a claimant no right or title to or in vested property until the time of actual payment or

delivery to him.[8] Section 32, which was added to the Act in 1946 primarily to authorize discretionary administrative returns of vested property to "'technical' enemies," who could not maintain suit under Section 9(a) of the Act (*Guessefeldt* v. *McGrath*, 342 U.S. 308, 314–315; *McGrath* v. *Zander*, 177 F. 2d 649, 651 (C.A.D.C.)), provides that a return is not to be made unless and until the President or his delegate finds that "such return is in the interest of the United States" (*infra*, p. 13). The discretion relates to the return itself, and therefore clearly continues until the point of the actual return, since Section 32 itself expressly states in subsection (f) that the publication of a notice of intention "confer[s] no right of action" (*infra*, p. 14). Nor does the Act contain any other provision for a binding commitment to make a return. Accordingly, the Return Order, under the Regulations, is merely the direction of the Attorney General to his subordinates to make the final audit and to prepare the necessary papers (*supra*, p. 3, fn. 4). Since the Return Order was not a binding commitment, the amendment of that Order obviously did not constitute a seizure or taking of petitioner's property.

2. *Petitioner had a constitutionally adequate remedy under Section 9(a).* Petitioner's property was seized in September 1943 by the vesting order. Property so seized could be recovered by a non-enemy claimant

[8] The same situation existed under the post-World War I return provisions of Section 9(b). See *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 121–122.

by bringing suit in equity under Section 9(a), which petitioner in fact cited as the basis for his complaint in the district court (J.A. 1). Such an action is clearly adequate to protect all rights guaranteed by the Fifth Amendment. *Stoehr* v. *Wallace*, 255 U.S. 239, 246; *Becker Steel Co.* v. *Cummings*, 296 U.S. 74, 79; *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 487.

The remedy under Section 9(a) is, by virtue of the express language of Sections 7(c) and 9(f) of the Act (*infra*, pp. 11, 13), the "sole relief and remedy of any person having any claim" to vested property and is therefore the only form of proceeding in which the United States has consented to be sued with respect to such property. *Becker Steel Co.* v. *Cummings*, *supra*, 296 U.S. 74; *Von Opel* v. *Uebersee Finanz-Korporation*, 225 F. 2d 530 (C.A.D.C.), certiorari denied, 350 U.S. 935; *Berger* v. *Ruoff*, 195 F. 2d 775 (C.A.D.C.), certiorari denied, 343 U.S. 950; *Pflueger* v. *United States*, 121 F. 2d 732 (C.A.D.C.), certiorari denied, 314 U.S. 617; *Cummings* v. *Hardee*, 102 F. 2d 622, 627 (C.A. D.C.), certiorari denied, 307 U.S. 637; *Kuttroff* v. *Sutherland*, 66 F. 2d 500 (C.A. 2); *Becker Steel Co.* v. *Cummings*, 95 F. 2d 319, 320 (C.A. 2), certiorari denied, 305 U.S. 604; *Kochler* v. *Clark*, 170 F. 2d 779, 780 (C.A. 9). Specifically, as the Court of Appeals for the District of Columbia Circuit has held in a series of decisions, the "sole relief and remedy" provisions of the Act bar any relief or remedy by way of judicial review of administrative action under Section 32,

under the Administrative Procedure Act[9] or otherwise. *McGrath* v. *Zander, supra*; *Hawley* v. *Brownell*, 215 F. 2d 36 (C.A.D.C.); *Tiedemann* v. *Brownell*, 222 F. 2d 802 (C.A.D.C.); *Rogers* v. *Schilling*, C.A. D.C., No. 14723, decided May 21, 1959, not yet officially reported. Thus, as a matter of statutory construction and the unanimous decisions of the federal courts, the only judicial remedy available to petitioner was a suit under Section 9(a).

3. *Petitioner's suit under Section 9(a) was barred by limitations.* As a statute giving the consent of the United States to be sued, Section 9(a) is subject to such limitations as Congress may impose. By Section 33 of the Act (*infra*, p. 14), Congress provided that no suit under Section 9 might be maintained after April 30, 1949, or after the expiration of two years from the date the property "vested in" the Alien Property Custodian, "whichever is later," except that any period of time during which a claim for return of the property was pending should be excluded from the computation of the two years. The vesting order with respect to petitioner's property became effective September 27, 1943 (*supra*, p. 2), and that was the date the property "vested in" the Custodian. Since petitioner did not file his notice of claim until December 1946, more than two years after the date of vesting, the two-

[9] Petitioner suggests (Pet. 4, 5) that because Section 32 of the Trading with the Enemy Act was enacted in 1946 after Section 12 of the Administrative Procedure Act, 5 U.S.C. 1011, administrative determinations under Section 32 are subject to review. But the sole relief and remedy provisions of Sections 7(c) and 9(f) date back to 1918 and 1917, respectively, and have not been amended in any respect.

year period was not extended by the pendency of his claim and April 30, 1949, was the "later" date before which suit had to be brought. Petitioner, however, did not file his suit until December 1955 or over six years too late, and, therefore, the district court did not have jurisdiction over the action. *Pass* v. *McGrath*, 192 F. 2d 415 (C.A.D.C.), certiorari denied, 342 U.S. 910; *Kroch* v. *McGrath*, 192 F. 2d 416 (C.A. D.C.), certiorari denied, 342 U.S. 927; *Hawley* v. *Brownell*, 215 F. 2d 36 (C.A.D.C.); *Brownell* v. *Nakashima*, 243 F. 2d 787 (C.A. 9), certiorari denied, 355 U.S. 872; *Grabbe* v. *Brownell*, 247 F. 2d 402 (C.A. 2); *Cisatlantic Corp.* v. *Brownell*, 131 F. Supp. 406 (S.D.N.Y.), affirmed, 222 F. 2d 957 (C.A. 2).

As a time-limit-consent statute, Section 33 is not subject to any exceptions, unless expressly stated. *Soriano* v. *United States*, 352 U.S. 270, 276. Therefore, since the Attorney General has been given no authority to waive or extend the period of limitations, his action in allowing the claim administratively in December 1948 did not give the petitioner any additional time. Cf. *Cisatlantic Corp.* v. *Brownell*, *supra*; *Wallace* v. *United States*, 142 F. 2d 240 (C.A. 2), certiorari denied, 323 U.S. 712; *Anderegg* v. *United States*, 171 F. 2d 127 (C.A. 4), certiorari denied, 336 U.S. 967.[10]

[10] Petitioner seems to suggest that the Return Order of the Attorney General lulled petitioner into failing to file a notice of claim under Section 9(a) within the limitations period (Pet. 5). But the wording of subsection (f) of Section 32, the very provision under which petitioner filed his notice of claim in December 1946, clearly warned petitioner that the Return Order of the Attorney General gave him no vested rights. Sim-

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1959.

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ilarly, Section 33 expressly provides a limitations period for bringing an action under Section 9(a). Thus, petitioner was on notice that, if the Attorney General revoked or modified his intention to return after the limitations period as to Section 9(a) had run, petitioner would be foreclosed from judicial review of that action if he chose to make his notice of claim under Section 32 (as he did) rather than Section 9(a) (as he was entitled to do). See the opinion of the court of appeals, Pet. 13-14. But even if petitioner could reasonably have relied on the Return Order in not bringing suit under Section 9(a), the government is not bound by estoppel in a case such as this.

APPENDIX

The Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 1, *et seq.*, provides in pertinent part:

Section 7(c):

* * * * *

> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act * * *.

* * * * *

Section 9:

> (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the

money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia, or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or

decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

* * * * *

Section 32(a):

The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

* * * * *

(5) that such return is in the interest of the United States.

Section 32(d):

Except as otherwise provided herein, and except to the extent that the President or such officer or agency as he may designate may otherwise determine, any person to whom return is made hereunder shall have all rights, privileges, and obligations in respect to the property or interest returned . . . which would have existed if the property or interest had not vested in the Alien Property Custodian, but no cause of action shall accrue to such person in respect of any deduction or retention of any part of the property or interest or proceeds by the Alien Property Custodian for the purpose of paying taxes, costs, or expenses in connection with such property or interest or proceeds; * * *

Section 32(f):

> At least thirty days before making any return to any person other than a resident of the United States * * * the President or such officer or agency as he may designate shall publish in the Federal Register a notice of intention to make such return, specifying therein the person to whom return is to be made and the place where the property or interest or proceeds to be returned are located. Publication of a notice of intention to return shall confer no right of action upon any person to compel the return of any such property or interest or proceeds, and such notice of intention to return may be revoked by appropriate notice in the Federal Register. * * *

Section 33:

> * * * No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 213

HELMUT EISENTRAGER,

Petitioner

v.

WILLIAM P. ROGERS, Attorney General of the United States,

Respondent

REPLY BRIEF

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REPLY BRIEF

Respondent's only argument in response to petitioner's position that respondent's actions are reviewable under the Administrative Procedure Act is the language of two provisions of the Trading with the Enemy Act: (1) section 7, stating that the sole relief and remedy of any person having a claim to vested property is that contained in the Act, and (2) section 33, establishing a two year period after vesting for the filing of court actions for the return of property under section 9 of the Act.

Section 32 of the Trading with the Enemy Act, under which respondent chose to consider petitioner's claim rather than under section 9, provided a new administrative remedy for the return of vested property, under standards entirely different from those in section 9. Section 32 was enacted into law in August 1946, subsequent to the Administrative Procedure Act. Section 12 of the Administrative Procedure Act provides that:

". . . no subsequent legislation shall be held to supersede or modify the provisions of this Act, except to the extent that such legislation shall do so expressly."

There was nothing in the act enacting section 32 of the Trading with the Enemy Act excluding judicial review under the provisions of the Administrative Procedure Act of the administrative actions taken by respondent thereunder, and therefore by the express terms of the Administrative Procedure Act quoted above judicial review exists.

Section 7 of the Trading with the Enemy Act was enacted in 1917 as part of the original World War I statute. Respondent relies upon an asserted implication that section 32, enacted 29 years later, was intended by Congress to be made subject to section 7. Even if the legislative history of section 32 supported such an implication, which is not the case, and is not even argued by respondent, such an implication would not comply with the requirement of section 12 of the Administrative Procedure Act that only an *express* exemption in any subsequent legislation could have the effect of removing it from the applicability of the judicial review provisions.

In any event, section 7 spoke of "sole relief and remedy", which related to original court actions rather than review of administrative determinations, and this 1917 provision did not foreclose judicial review as to the legality or constitutionality of administrative actions of respondent under the broadened relief provisions of the 1946 Act establishing an entirely new procedure for the consideration of claims under section 32.

Section 33, the other provision of the Trading with the Enemy Act on which respondent relies, established a time limit for statutory suits under section 9 of that Act. This section was also enacted in August 1946, subsequent to the Administrative Procedure Act, and said nothing whatever as to limitation on judicial review of

administrative actions, under section 32 or under section 9, where respondent likewise has authority to consider claims administratively, in addition to the jurisdiction of the federal courts to entertain original suits.

Here again, there is nothing even asserted by respondent in the legislative history to give rise to the implication that Congress intended to cut off judicial review under the Administrative Procedure Act, and far less the express exemption from review required under section 12 of that Act.

According to the position of respondent, Congress intended to free him from any possibility of review of his actions in dealing with property summarily seized under the war power, with the single exception of the relief provided under section 9. That section is quite restricted in its applicability, and the principal source of relief, under which the great majority of claims for the return of property seized during World War II have been and are being considered, is that provided by section 32. The immunity from judicial review for which respondent argues would give him final and unreviewable authority over thousands of claims involving millions of dollars of property. Such unlimited authority leads to such flagrant disregard of law as occurred in this case, and the provisions for judicial review of the Administrative Procedure Act were enacted for the specific purpose of restricting such unreviewable authority to situations where Congress felt it necessary to make specific exception.

In the past, most of the unsuccessful claimants under section 32 have been rendered financially unable to support a court action to the point of reaching this Court, since they were subject to Nazi pillage and persecution, and their property in this country was taken by respondent. Fortunately, however, petitioner has been able to do so, and, it is submitted, this Court should take

the opportunity to consider the serious and far-reaching issues presented.

Respectfully submitted,

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